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NO. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF SOUTH DAKOTA; FALL RIVER COUNTY, SOUTH DAKOTA; SHERRILL DRYDEN, IN HER OFFICIAL CAPACITY AS FALL RIVER COUNTY AUDITOR,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Mark V. Meierhenry, Attorney General of the State of South Dakota, on behalf of the State of South Dakota, Fall River County, and

Sherrill Dryden, Fall River County Auditor, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on December 29, 1980.

QUESTIONS PRESENTED

I

WHETHER A STATE STATUTE, WHICH REQUIRES THAT A CANDIDATE FOR BOARD OF COUNTY COMMISSIONERS BE A RESIDENT OF THE COUNTY, VIOLATES THE VOTING RIGHTS ACT, 42 U.S.C. §§ 1971 ET SEQ., WHEN THE STATUTE IS INTERPRETED TO PREVENT RESIDENTS OF AN UNORGANIZED COUNTY ATTACHED TO AN ORGANIZED COUNTY FOR ADMINISTRATIVE PURPOSES FROM RUNNING FOR COUNTY OFFICE.

II

WHETHER A STATE STATUTE, WHICH REQUIRES THAT A CANDIDATE FOR BOARD OF COUNTY COMMISSIONERS BE A RESIDENT OF THE COUNTY, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT WHEN THE STATUTE IS INTERPRETED TO PREVENT RESIDENTS OF AN UNORGANIZED COUNTY ATTACHED TO AN ORGANIZED

COUNTY FOR ADMINISTRATIVE PURPOSES FROM RUNNING FOR COUNTY OFFICE.

PARTIES TO THE PROCEEDING

All parties to the proceedings from the United States Court of Appeals for the Eighth Circuit from whose judgment review is sought are included in the caption of the case before this Court.

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OPINIONS BELOW

The opinion of the District Court for the District of South Dakota, reported at 491 F.Supp. 1349 (D.S.D. 1980), appears in the appendix (Appendix A, pp. A 1-A 8). The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 636 F.2d 241 (8th Cir. 1980), appears in the appendix (Appendix B, pp. A 9-A 22).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 29, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in the pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1971 et seq., are as follows:

> 42 U.S.C. § 1971(a)(1). All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding.
>
> 42 U.S.C. § 1971(a)(2). No person acting under color of law shall -- (A) in determining whether any individual is qualified under state law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by state officials to be qualified to vote.

> 42 U.S.C. § 1973. No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in the contravention of the guarantees set forth in § 1973b(f)(2) of this title.

The relevant provisions of the South Dakota statutues, SDCL 7-17-1 and SDCL 7-8-2, are as follows:

> SDCL 7-17-1. The unorganized county of Shannon is attached to the county of Fall River for administration of governmental and fiscal affairs, including all state, county, judicial, taxation, election, recording, canvassing, and foreclosure purposes, excepting in cases where the administration of any of said affairs is expressly otherwise provided by law.
>
> SDCL 7-8-2. The nomination and election of county commissioners shall be by a vote of the electors of the district of which such candidate is a resident elector.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Both organized and unorganized counties are provided for by South Dakota law.[1] Whether organized or unorganized, counties are distinct political subdivisions and bodies corporate for civil and political purposes.[2] The two unorganized counties in South Dakota, Shannon and Todd, are the only unorganized counties in the United States.

Among the elected officials of organized counties are the following: board of county commissioners; register of deeds; county auditor; county treasurer; sheriff; coroner; and state's attorney.[3] These county officials have all of the

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[1] SDCL 7-4

[2] SDCL 7-18-1

[3] SDCL 7-8 through SDCL 7-16

powers in connection with the affairs of the unorganized counties, unless specifically excepted by the state legislature.[4] Fall River County is an organized county. Shannon County is an unorganized county which is attached to the organized county of Fall River for the administration of governmental and fiscal affairs.[5]

Prior to the 1975 Eighth Circuit Court of Appeals decision in Little Thunder v. South Dakota,[6] the state election laws provided that citizens of the unorganized counties had the right to vote in all state and national elections and for officers of the unorganized county offices only.[7] This statute was declared unconstitutional, the United States Court of Appeals for the Eighth

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[4] SDCL 7-17-5; SDCL 7-17-3

[5] SDCL 7-17-1

[6] 518 F.2d 1254 (8th Cir. 1975)

[7] SDCL 12-23-2

Circuit holding that the citizens of the unorganized counties were entitled the right to vote for the elected officials of the organized counties. The candidates for county office in Fall River County now have their names printed on Shannon County ballots and are elected by the citizens of both counties.

State law provides many guidelines in the area of taxing in unorganized counties. The county school board of an unorganized county may appoint an assessor for the county.[8] While the county board of equalization for the organized county equalizes assessments for the attached unorganized county[9] and the board of county commissioners of the organized county levies taxes on the property in the unorganized county for

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[8] SDCL 10-3-9

[9] SDCL 10-11-38

the unorganized county's needs,[10] the levy may not exceed five mills.[11] The commissioners may set a much greater mill levy for their organized county.[12] The tax funds collected by the county treasurer from the unorganized county must be kept separate from the funds of the organized county.[13] Additionally, all the records and property of the organized and unorganized counties must be kept separate.[14]

Several other areas of the operating and governing of unorganized counties are set by state statute. Bond issues in unorganized counties must be approved by the governor.[15] The

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[10] SDCL 10-12-10

[11] SDCL 10-12-19, SDCL 10-12-23

[12] SDCL 10-12-21

[13] SDCL 10-12-22

[14] SDCL 7-17-13

[15] SDCL 7-24-26 through SDCL 7-24-31

deputy sheriff in an unorganized county, whose appointment must be approved by the governor, must be a resident of the unorganized county.[16] Other peace officers and constables in the unorganized county are appointed by the governor and must be residents of the unorganized county.[17] State statutes also create a highway board in unorganized counties. These boards have the same powers over roads in unorganized counties as do county commissioners over highways and roads in organized counties.[18] Each unorganized county highway board has all of the powers and duties relative to the construction, repair and improvement of highways and bridges in the county. In addition, the highway board may hire employees,[19] enter into construction and

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[16] SDCL 7-17-6

[17] SDCL 7-17-10

[18] SDCL 31-3-21; SDCL 31-11-8; SDCL 31-11-16

[19] SDCL 31-11-16.1

maintenance contracts,[20] and levy taxes for highway and bridge purposes.[21] The commissioners in organized counties may not levy taxes for road purposes in unorganized counties.[22] Proceeds from the state motor vehicle fuel tax attributable to the unorganized county are credited to the highway fund of the unorganized county for use by the highway board.[23]

The geographic boundaries of Shannon County are entirely within the confines of the Pine Ridge Indian Reservation. Neither the State of South Dakota nor Fall River County has jurisdiction over Indians residing on the reservation. There is a limited tax base in Shannon County

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[20] SDCL 31-11-17

[21] SDCL 31-11-19

[22] SDCL 31-11-25

[23] SDCL 10-47-76

because neither the property owned by an enrolled member of the tribe nor the tribe itself is subject to state or local taxation.[24]

Fall River County elects all of its county officers "at large."[25] South Dakota law requires that a candidate for the Fall River Board of County Commissioners be a resident of Fall River County.[26] In 1976, Mr. Frank Rapp, a resident of Shannon County, attempted to file a nominating petition for the office of county commissioner of Fall River County. Defendant Dryden, Fall River County Auditor, refused to accept the petition because Mr. Rapp was not a resident of Fall River County.

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[24] Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965)

[25] SDCL 7-8-10

[26] SDCL 7-8-2; SDCL 12-1-4 defines "residence"

B. STATEMENT OF THE PROCEEDINGS BELOW.

On April 4, 1978, the United States Department of Justice filed suit on behalf of the United States, alleging the the Defendants' refusal to permit residents of Shannon County to run for Fall River County offices violated the Voting Rights Act of 1965 and several provisions of the United States Constitution. Specifically, violations of 42 U.S.C. §§ 1971(a)(1), 1971(a)(2)(A), 1973, and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution were alleged.

After a hearing, District Court Judge Andrew W. Bogue, District of South Dakota, denied Plaintiff's prayer for injunctive relief and granted Defendant's Motion for Summary Judgment filing a Memorandum Opinion and issuing a final judgment on July 2, 1980, (Appendix A, pp. A 1-A 8). The District Court held that the policy of allowing only residents of the county to run for

office in that county was not racially motivated; that proof of racial discrimination is necessary to establish a violation of 42 U.S.C. § 1971; that Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) and not Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975) was applicable to the factual situation presented in the matter; and that no violation of the Equal Protection Clause of the Fourteenth Amendment had been proven.

The district court had jurisdiction pursuant to 42 U.S.C. §§ 1971(d), 1973j(f) and 28 U.S.C. §§ 1343(4), 1345.

The Plaintiff filed its amended Notice of Appeal to the U.S. Court of Appeals for the Eighth Circuit on July 7, 1980. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. By an opinion filed December 29, 1980, the Court of Appeals reversed and remanded the action to the district court (Appendix B, pp. A

9-A 22). Finding a real and appreciable impact on the exercise of the voting franchise by the Defendants' residency statutes, the Court of Appeals held that the compelling State interest test was to be used to determine if an Equal Protection violation occurred; that the Equal Protection claim was implicitly decided in favor of the United States in Little Thunder, supra; and that Holt Civic Club, supra, did not overrule the Little Thunder decision.

REASONS FOR GRANTING THE PETITION

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DECIDED A FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

In Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978), this Court held that the City of Tuscaloosa's exercise of police powers outside of its city boundaries upon the residents of Holt, Alabama, without a corresponding extension to the residents of Holt of the voting franchise on an

equal footing with those residing within the Tuscaloosa city limits, did not deny residents of Holt their Fourteenth Amendment Due Process and Equal Protection Rights.

In footnote 8 of Holt Civic Club, this Court distinguished the factual situation presented in Holt Civic Club from the one found in Little Thunder v. South Dakota, 518 F.2d 1253 (8th Cir. 1975). Because the United States Court of Appeals for the Eighth Circuit did not consider the complete factual setting before it decided Little Thunder v. South Dakota, supra, this Court's factual distinguishment of Little Thunder in Holt Civic Club, supra, was based on an incomplete factual setting.

In United States v. South Dakota, et al., 636 F.2d 241 (8th Cir. 1980), the United States Court of Appeals for the Eighth Circuit held that Little Thunder v. South Dakota, supra, had not been overruled by Holt Civic Club, supra. In United States v. South Dakota, et al.,

supra, the United States Court of Appeals for the Eighth Circuit premised its decision on the factual setting presented in Little Thunder v. South Dakota, supra. That factual setting did not properly represent to the Court of Appeals the governmental relationship between Fall River County's Board of County Commissioners, the organized county of Fall River, and the unorganized county of Shannon. This Court, when it distinguished Little Thunder v. South Dakota, supra, in footnote 8 of Holt Civic Club, supra, also relied on the incomplete factual background presented in Little Thunder. If this Court would have had a complete factual setting, as was presented in the proceedings of the United States District Court for the District of South Dakota in United States v. South Dakota, et al., 491 F.Supp. 1349 (D.S.D. 1980), it would not have distinguished Little Thunder v. South Dakota in its Holt Civic Club decision. Alternatively, if

Little Thunder v. South Dakota was to be cited in Holt Civic Club, supra, it should have been cited for the factual similarities between the governmental schemes in South Dakota and in Alabama, rather than for the differences.

In Holt Civic Club, this Court decided the equal protection issue using the "rational relationship" test. Finding a rational relationship to a legitimate state purpose, this Court upheld the Alabama extraterritorial police jurisdiction scheme. The United States Court of Appeals for the Eighth Circuit, in United States v. South Dakota, et al., found a real and appreciable impact on the exercise of the franchise by the South Dakota county attachment scheme. As a result, the "compelling state interest" test was used in deciding the equal protection issue.

The statutory scheme in South Dakota dealing with the governmental relationship between organized counties and the attached

unorganized counties allows for very few discretionary actions by the governing body of the organized county with respect to the unorganized county. The situation presented in the South Dakota scheme clearly provides for less discretionary governmental power over the citizens of the unorganized county by the organized county's Board of County Commissioners than did the Alabama scheme approved by this Court in Holt Civic Club, supra. These similarities make this Court's decision in Holt Civic Club, supra, applicable to the fact situation in South Dakota. Because Holt Civic Club is applicable, the proper test in deciding the Equal Protection issue is the "rational relationship" test rather than the "compelling state interest" test used by the Court of Appeals in United States v. South Dakota, et al., supra. Therefore, the decision of the United States Court of Appeals for the Eighth Circuit in United States v. South Dakota et. al., supra, is

in conflict with the applicable United States Supreme Court decision in Holt Civic Club, supra.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeal for the Eighth Circuit should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in the case of State of South Dakota; Fall River County, South Dakota; Sherrill Dryden in her Official Capacity as Fall River County Auditor v. United States of America, was served by United States mail, first class, postage prepaid, upon the Solicitor General, Department of Justice, Washington, D.C. 20530, on this 30th day of March, 1981.

MARK V. MEIERHENRY
ATTORNEY GENERAL

APPENDIX A

UNITED STATES OF AMERICA

v.

STATE OF SOUTH DAKOTA; Fall River County, South Dakota; Sherrill Dryden, in her official capacity as Fall River County Auditor

No. CIV 78-5018

United States District Court, D. South Dakota

July 2, 1980

MEMORANDUM OPINION

BOGUE, Chief Judge.

Under S.D.C.L. 7-17-1 the unorganized county of Shannon is attached to Fall River,

> [f]or administration of governmental and fiscal affairs, including all state, county, judicial, taxation, election, recording, canvassing, and foreclosure purposes, excepting in cases where the administration of any of said affairs is expressly otherwise provided by law.

In 1976, Frank Rapp, a Shannon County resident, attempted to file a nominating petition in Fall River County to run for the position of county

commissioner. Defendant Dryden, the Fall River County Auditor, refused to allow him to file the nominating petition because he was not a Fall River County resident. Because of defendants' position that Shannon County residents are not eligible to run for Fall River County offices, plaintiff brought this action alleging both a violation of the Voting Rights Act[1] and a violation of the Constititution's Equal Protection Clause.

This Court will first address the alleged violation of the Voting Rights Act. In regard to this issue, defendants argue that plaintiff has failed to establish that defendants' residency policy is racially motivated and thus plaintiff has no claim under 42 U.S.C. § 1971(a). Plaintiff contends that it need not prove racial motivation to invoke the sanctions contained in § 1971.

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[1] The section allegedly violated are 42 U.S.C. § 1971(a)(1) and § 1971(a)(2)(A).

Furthermore, plaintiff argues that even if proof of racial motivation is required, evidence of such has been presented.

Contrary to plaintiff's contention, this Court is of the opinion, and so finds, that defendants' policy is not racially motivated. See Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Therefore, the only question remaining is whether the proof of racial motivation is necessary in order to apply § 1971.

There is a split of authority in regard to this issue. Some courts have held that § 1971 applies to cases of non-racial discrimination. See Ball v. Brown, 450 F.Supp. 4 (N.D. Ohio 1977); Frazier v. Callicutt, 383 F.Supp. 15 (N.D.Miss. 1974). However, a number of other courts have indicated that the Voting Rights Act is designed to protect only against racial discrimination. See State of South Carolina v. Katzenbach, 383 U.S.

301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966); O'Neal v. Gresham, 519 F.2d 803 (4th Cir. 1975); Ballas v. Symm, 351 F.Supp. 876 (S.D.Tex.1972); Brooks v. Nacrelli, 331 F.Supp. 1350 (E.D.Pa. 1971); Gremillion v. Rinaudo, 325 F.Supp. 375 (E.D.La.1971). In Ballas, supra, at 888, the court stated in speaking of § 1971(a)(2) that,

> Although this provision is broadly written, to argue that it applies without regard to race ignores the statute as a whole, its legislative history, and prior judicial construction. The Civil Rights Act of 1964 and Section 1971 of the Code clearly aim at eliminating racially motivated practices which restrict exercise of the elective franchise.

[1, 2] This Court finds the reasoning of the Ballas court persuasive and therefore holds that proof of racial discrimination is necessary under § 1971. Since no such racial discrimination has been established, defendants' motion for summary judgment as to the plaintiff's § 1971 claim, will be granted.

The next issue to be dealt with is whether defendants' policy violates the Equal Protection Clause of the United States Constitution. Under S.D.C.L. 12-23-2, residents of an unorganized county were not permitted to vote for county officials of the organized county to which the unorganized county was attached. In Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975), the statute was declared unconstitutional as a violation of the equal protection clause. Plaintiff argues that the same reasoning should apply in the case at bar and that citizens of unorganized Shannon County should be eligible to run for county offices in Fall River County.

Although plaintiff's argument might be quite persuasive if this Court were to look only at the Little Thunder decision, a subsequent decision by the Supreme Court seems to have altered the state of the law somewhat. In Holt Civic Club

v. City of Tuscaloosa, 439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978), the Supreme Court was faced with a similar situation. Holt is an unincorporated community located on the outskirts of Tuscaloosa, Alabama. Under Alabama law Holt was subject to the police and sanitary regulations of Tuscaloosa. Holt was also subject to Tuscaloosa's criminal jurisdiction and the city's power to license businesses. Holt residents brought an action against Tuscaloosa claiming that is residents should be allowed to vote in Tuscaloosa city elections. The Supreme Court denied that Holt was entitled to relief. The court stated:

> From these and our other voting qualifications cases a common characteristic emerges: the challenged statute in each case denied the franchise to individuals who where physically resident within the geographic boundaries of the governmental entity concerned . . . . No decision of this Court has extended the 'one man, one vote' principle to individuals residing

> beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders. Holt, 99 S.Ct. at 389.

[3] The situation in the case at bar is closely akin to that existing in Holt. Shannon County lies outside the georgraphical boundaries of Fall River County and the two counties are separate entities. See S.D.C.L. 7-1-24, 7-1-57, and 7-18-1. In Holt, at page 391, footnote 8, the Supreme Court cites Little Thunder and distinguishes it by saying the situation is different where the incorporated territory "is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits." The record clearly indicates that Fall River County officials do not exercise "precisely

the same governmental powers" over Shannon County residents as they do over their own residents. The fact that Shannon County is part of an Indian reservation and that all but fourteen percent of it is federal or Indian land, severely restricts the authority of Fall River County over Shannon County.[2] Furthermore, the State of South Dakota, not Fall River County, exercises considerable control over the affairs of Shannon County. In addition, Shannon County itself has control over various governmental functions.[3] It appears to this Court that the relationship between Fall River and Shannon Counties and that between Holt and Tuscaloosa, Alabama are quite

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[2] For example, Fall River County has no power to levy taxes on Indian land. Furthermore, the sheriff of Fall River County has no jurisdiction over crimes occurring in Indian country.

[3] For instance, Shannon County residents elect their own highway board. SDCL 12-23-3.

similar and that the Holt case should govern here. Therefore, it is the determination of this Court that plaintiff has failed to prove a violation of the equal protection clause and that defendants' motion for summary judgment as to this claim will also be granted.

The foregoing opinion constitutes this Court's findings of facts and conclusions of law.

APPENDIX B

UNITED STATES OF AMERICA

Appellant

v.

STATE OF SOUTH DAKOTA; Fall River County, South Dakota; Sherrill Dryden, in her official capacity as Fall River County Auditor, Appellees.

No. 80-1588

United States Court of Appeals
Eighth Circuit

Submitted October 13, 1980

Decided December 29, 1980

Before HEANEY, BRIGHT and HENLEY, Circuit Judges.

HEANEY, Circuit Judge.

In April, 1976, Frank Rapp, an Indian and a resident of Shannon County, South Dakota, attempted to run for the office of county commissioner of Fall River and Shannon counties. The

Fall River County Auditor refused to file his nominating petition on the advice of officials of Fall River Coutny and the State Attorney General, who took the position that only residents of Fall River County could run for the office of county commissioner. As a consequence, Rapp's name did not appear on the ballot for the 1976 primary.

On April 4, 1978, the United States filed a complaint against the State of South Dakota, Fall River County and the auditor of Fall River County. The complaint alleged that the refusal of Fall River County to permit residents of Shannon County, 86.2 percent of whom are Indian, to run for elective county offices traditionally held by residents of Fall River County, violated 42 U.S.C. § 1971(a)(1), 42 U.S.C. § 1971(a)(2)(A), 42 U.S.C. § 1973, and the First, Fourteenth and Fifteenth Amendments.

The district court, 491 F.Supp. 1349, denied the request of the United States for declaratory and injunctive relief. It held with respect to the statutory claims under 42 U.S.C. § 1971 that proof of intentional racial discrimination was necessary, and that the United States did not meet its burden of proof. The court rejected the Fourteenth Amendment claim, holding that Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 292 1978), overruled this Court's decision in Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975), on which the government's Fourteenth Amendment claim was based. The court did not address the government's claims under 42 U.S.C. § 1973 and the First and Fifteenth Amendments. We reverse.

THE FACTS

This litigation stems from the unusual governmental structure of counties in the State of

South Dakota. This Court described it in Little Thunder, id. at 1254-1255 as follows:

> The State of South Dakota is divided, by S.D.C.L. §§ 7-1-2 through 7-1-68 (1967), into sixty-seven county units. For purposes of county administration and government, these sixty-seven counties are divided into organized and unorganized counties. S.D.C.L. § 7-4-1 (1967) recognized the validity of every county government operating as such on the date of South Dakota's admission as a state. These became the first recognized counties. Presumably all other counties were at that time designated as unorganized counties. A statutory method of organizing a county government, through petition and referendum, was also established and at the present time the only unorganized counties are * * * Todd, Washabaugh and Shannon.
>
> Each organized county has a full complement of elected county officials whose task it is to administer the affairs of local government. They include county commissioners, judges, clerks of court, register of deeds, auditor, treasurer, sheriff, coroner and attorney. The unorganized counties, however, do not elect these officials for themselves but rather are attached to an adjoining county for purposes of government and administration. The officials of the organized counties, under the provisions of S.D.C.L. §§ 7-17-3 (1967) and

> 7-17-5 (1974), administer the affairs of the attached unorganized counties and have all the powers and duties with regard to the attached county that they have in their own. The residents of the unorganized counties, such as plaintiffs, are not permitted to vote for the county officers in the organized county to which their county is attached. Thus plaintiffs cannot vote for most of the elected county officials who govern them. They may vote only for school board members and highway officials. See S.D.C.L. §§ 12-23-3 and 13-8-1(1974). They can, of course, vote for all state and national offices. [Footnotes omitted.]

[1] In Little Thunder v. State of South Dakota, supra, we held the South Dakota laws which prevented residents of unorganized counties from voting for county officers of the organized county to which their county was attached to be unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment. This lawsuit arose in the wake of our decision in Little Thunder, when Fall River County officers and the State Attorney General took the position

that only residents of Fall River County could become candidates for the office of county commissioner even though residents of Shannon County could vote for that office.

[2] The United States contends, inter alia, that denial of the right of Shannon County residents to become candidates for Fall River County offices is in violation of the Equal Protection Clause of the Fourteenth Amendment. We agree and reverse the district court on the basis that the Equal Protection claim raise in this case[1] was

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[1] The appellees contend in a footnote to their brief on appeal that the United States lacks standing to raise the Fourteenth Amendment claim. The government contends that the Attorney General has statutory authority to institute suit based on 42 U.S.C. §§ 1971 and 1973j(d). We concur. The Supreme Court in Louisiana v. United States, 380 U.S. 145, 151, 85 S.Ct. 817, 821, 13 L.Ed.2d 709 (1965), stated, "We have held this day in United States v. Mississippi, 380 U.S. 128, [85 S.Ct. 808, 13 L.Ed.2d 717] that the Attorney General has power to bring suit against a State and its officials to protect the voting rights of Negroes

implicitly decided in favor of the United States in the Little Thunder decision.[2]

Little Thunder established that residents of Shannon County have the right to vote for Fall River County offices. That right to vote may not

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guaranteed by 42 U.S.C. § 197(a) and the Fourteenth and Fifteenth Amendments." The voting rights of Indians are similarly protected and are the focus of both the Fourteenth and Fifteenth Amendment claims.

[2] A general principle of judicial administration is that "dispositive issues of statutory and local law are to be treated before reaching constitutional issues." Wolston v. Reader's Digest Ass'n. Inc., 443 U.S. 157, 161 n.2, 99 S.Ct. 2701, 2704 n.2, 61 L.Ed.2d 450 (1979). In this case statutory and constitutional issues are inseparable. The government presses only its claim under 42 U.S.C. § 1973 on this appeal, apparently on the basis that the claims under 42 U.S.C. 1971 are substantially the same as the § 1973 claim. The Supreme Court has described § 1973 as nothing more than a elaboration upon the Fifteenth Amendment and has observed that its effect was to be no different from that of the Fifteenth Amendment. City of Mobile, Ala. v. Bolden, 446 U.S. 53, 100 S.Ct. 1490, 1496, 64 L.Ed.2d 47 (1980)(plurality opinion).

be burdened by arbitrary restrictions. As the Supreme Court state in Evans v. Cornman, 398 U.S. 419, 422, 90 S.Ct. 1752, 1754, 26 L.Ed.2d 370 (1970),

> there can be no doubt at this date that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Harper v. Virginia Board of Elections, 383 U.S. 663, 665 [86 S.Ct. 1079, 1080, 16 L.Ed.2d 169] (1966); see Williams v. Rhodes, 393 U.S. 23, 29 [89 S.Ct. 5, 9, 21 L.Ed.2d 24] (1968). Moreover, the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges. See Yick Wo v. Hopkins, 118 U.S. 356, 370 [6 S.Ct. 1064, 1071, 30 L.Ed. 220] (1886); Wesberry v. Sanders, 376 U.S. 1, 17 [84 S.Ct. 526, 534, 11 L.Ed.2d 481] (1964).

The candidacy restriction at issue here clearly burdens the right to vote in that it restricts the field of candidates and thus limits the voters' freedom of choice. As the Supreme Court

pointed out in Powell v. McCormack, 395 U.S. 486, 547, 89 S.Ct. 1944, 1977, 23 L.Ed.2d 491 (1969):

> A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." * * As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.

[3, 4] We next must determine the appropriate test with which to assess whether an Equal Protection violation has occurred here. As we stated in McLain v. Meier, ___ F.2d ___, ___ No. 80-1656 (8th Cir., Oct. 21, 1980), restrictions affecting the right to vote

> must cause a discrimination "of some substance" before the compelling state interest test is triggered. American Party of Texas v. White, 415 U.S. 767, 781, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974); see also Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); McDonald v. Bd. of Election Comm'rs. of Chicago, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969).

When dealing with candidacy restrictions in particular, before close scrutiny is called for, the restriction in question must have "a real and appreciable impact on the exercise of the franchise." Bullock v. Carter, 405 U.S. 134, 144, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972).

[5] Such an impact exists here. Approximately 43 percent of those eligible to vote for Fall River County offices reside in Shannon County. Those voters have been found by this Court to have sufficient interest in the affairs of Fall River and Shannon counties to have the right to vote. That right to vote is severely circumscribed by their inability to vote for candidates who live in the same county as they do. A huge segment of the population from which the pool of candidates normally drawn has been cut off by the candidacy restriction under attack here. The ultimate effect of the candidacy restriction would

be the denial of representation to an identifiable class of voters with a common interest.

Because of the impact of the candidacy restriction on the right to vote, we must look to whether the State and Fall River County offer sufficient justification for the restriction. The justification offered is that because the great majority of Shannon County voters reside on the Pine Ridge Indian Reservation and hence have little, if any, interest in the county government of either Shannon or Fall River County,[3] election of Shannon County residents would subject Fall

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[3] The whole of Shannon County is situated within the confines of the Pine Ridge Indian Reservation. The State of South Dakota and Fall River County officials have no jurisdiction over Indians residing on the Reservation. However, approximately 14 percent of the population of Shannon County is non-Indian. Furthermore, property within Shannon County which is not owned either by the Oglala Sioux Tribe or by an enrolled member of the Tribe is subject to state and local taxation.

River County residents to the possibility of a government dominated by persons who have a personal stake in the government insufficient to insure responsible exercise of their duties.

We have already held in Little Thunder that the residents of Shannon county have a sufficient interest in the election of Fall River County officials to be entitled to the right to vote for those officials. We described that interest as follows:

> residents of the unorganized counties possess a substantial interest in the choice of county officials since those officials govern their affairs.

Little Thunder v. State of South Dakota, supra, 518 F.2d at 1256. We are unable to accept the argument that a heightened level of interest is necessary before a Shannon County resident is entitled to run for office. The presumption that a candidate from Shannon County who possesses the substantial interest described above lacks a

similar substantial interest in the effective governance of the two combined counties is not a reasonable one.[4] Cf. Turner v. Fouche, 396 U.S. 346, 364, 90 S.Ct. 532, 542, 24 L.Ed.2d 567 (1970); Kramer v. Union Free School District, 395 U.S. 621, 632, 89 S.Ct. 1886, 1892, 23 L.Ed.2d 583 (1969).

The appellees sought at the district court and in this Court to relitigate our decision in Little Thunder. The district court found that Little Thunder had been overruled by Holt Civic Club v. Tuscaloosa, supra. We disagree.

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[4] Furthermore, the restriction paints with too broad a brush. Regardless of the merits of the argument that residents of the Indian Reservation have an insufficient stake in the affairs of Fall River and Shannon counties to be considered responsible candidates, 14 percent of the residents of Shannon County do not live on the Reservation and, therefore, cannot be rejected for the justification offered. In addition, Indians who live on the Reservation may own land outside the Reservation which is subject to taxes assessed by Fall River County officials.

We do not read Holt as expressing blanket approval of the proposition that in all instances the right to vote does not extend beyond the geographical boundaries of the governmental unit with respect to which the right to vote is sought. The sole issue before the Court in Holt concerned the constitutionality of a statute which provided for the extraterritorial exercise of "certain limited powers" by municipalities and which was applied through the state as a whole. As Mr. Justice Stevens pointed out in his concurring opinion, id. 439 U.S. at 78, 99 S.Ct. at 394:

> it may well be, as the opinion of the Court recognizes, ante, at 72-73, n.8 [99 S.Ct. at 391, n.8], that that scheme or another much like it might sometimes operate to deny the franchise to individuals who share the interest of their voting neighbors. No such question, however, is presented by this appeal from the decision of the three-judge District Court.

In footnote 8 of the Holt opinion, 439 U.S. at 72-73, 99 S.Ct. at 391, the Supreme Court

specifically distinguished Holt and Little Thunder on the basis of the degree of governmental activity undertaken by Fall River County. The appellees now attempt to place Little Thunder under the Holt umbrella, arguing that Fall River County officials control an insignificant portion of the affairs of Shannon County. As we held in Little Thunder, officials of Fall River County exercise general governmental functions with respect to Fall River County and Shannon County. The fact that Shannon County exercises other governmental functions independent of Fall River County[5] does not detract from the significance of the actions of Fall River County officials in their governance of Shannon County.

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[5] Shannon County voters elect a school board and highway board. Fall River County voters also elect a school board and highway board, and Shannon County voters do not vote for those Fall River County board members.

We reverse and remand with the direction that the district court enter appropriate relief on the government's claims.[6]

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[6] The South Dakota legislature enacted a law in 1979 (H.B. 1197, 54 Sess.) which repealed the provisions of the South Dakota Code relating to unorganized and organized counties. H.B. 1197 creates separately elected officials for each organized and unorganized county, but has not received preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. We were informed at oral argument that the Attorney General of the United States interposed an objection under § 1973c to H.B. 1997 on the ground that the government could not determine that the statute did not have a racially discriminatory effect. An action to determine the matter is now pending in the United States District Court for the District of Columbia. The Voting Rights Act of 1965 delegates to the Attorney General the authority and responsibility to protect the voting rights of all citizens. In light of this delegation, it is incumbent upon the Attorney General to assist the State of South Dakota in reaching a solution to the problem and not merely act as a "spoiler."

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No. 80-1712

In the Supreme Court of the United States

OCTOBER TERM, 1980

SOUTH DAKOTA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in holding that residents of an unorganized county in South Dakota who vote for officers of an attached organized county may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, be barred on residency grounds from running for elective county offices in the organized county, where the holders of those offices collectively exercise general governmental powers over both counties. The court of appeals' decision is correct and does not conflict with decisions of this Court or other courts of appeals. There is, accordingly, no reason for further review.

1. In *Little Thunder* v. *South Dakota*, 518 F. 2d 1253 (8th Cir. 1975), the court of appeals ruled that residents of South Dakota's unorganized counties have a right to vote for elected officials of those organized counties to which

they are attached for governmental and administrative purposes because each pair of organized-unorganized counties forms "a single unit of local government." 518 F. 2d at 1256.[1] In April 1976, an Indian resident of unorganized Shannon County attempted to run for county commissioner of Fall River and Shannon Counties, one of two remaining pairs of organized-unorganized counties (Pet. App. A-10). Petitioners refused to file this person's nominating petition because he did not reside in Fall River County and, as a consequence, his name did not appear on the ballot (*id.* at A-11).

The United States filed suit in the United States District Court for the District of South Dakota, alleging that petitioners had violated 42 U.S.C. 1971(a)(1) and (a)(2)(A), Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution (Pet. App. A-11). The district court rejected the claim under 42 U.S.C. 1971 on the ground that proof of invidious discrimination was lacking, and it rejected the United States' Fourteenth Amendment claim on the ground that this Court's decision in *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60 (1978), had effectively overruled *Little Thunder*, on which the claim was based. It did not specifically address the other claims (Pet. App. A-12).

2. The court of appeals reversed the district court's judgment, finding that petitioners' residency restriction on the right to run for office denied Shannon residents equal protection of the laws (Pet. App. A-15).[2] The court of

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[1]A more detailed description of the relationship between South Dakota's organized and unorganized counties is set forth in *Little Thunder* v. *South Dakota*, *supra*, 518 F. 2d at 1254-1255.

[2]The court of appeals did not consider our Voting Rights Act claim, which alleged purposeful racial discrimination, but decided the case on the basis of our nonracial Fourteenth Amendment claim, because it

appeals observed that, given its ruling in *Little Thunder* (which it refused to reconsider), Shannon residents had sufficient interest in voting for Fall River officials. It was "unable to accept the argument that a heightened level of interest is necessary before a Shannon County resident is entitled to run for office" (Pet. App. A-21).

3. Petitioners essentially contend (Pet. 20-25) that the court of appeals erred in its equal protection holding with respect to the ineligibility of Shannon County residents for county office because the holding is predicated in part on the court of appeals' earlier decision concerning the voting rights of Shannon County residents in *Little Thunder* v. *South Dakota, supra.* That decision, petitioners assert, is erroneous under the standards of *Holt Civic Club* v. *Tuscaloosa,* 439 U.S. 69 (1978), for assessing the constitutionality of subjecting particular areas to governmental regulation without extending the franchise to residents of those areas. Petitioners concede (Pet. 21) on the basis of a passage in *Holt* (439 U.S. at 73 n.8), that "this Court distinguished the factual situation presented in *Holt Civic Club* from the one found in *Little Thunder* * * *." Petitioners suggest (Pet. 22), however, that both the decision in *Little Thunder* and this Court's treatment of *Little Thunder* reflected an "incomplete factual background" that obscured the relationship of the county offices in question to both Fall River County and Shannon County.

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concluded that "the Equal Protection claim rais[ed] in this case was implicitly decided in favor of the United States in the *Little Thunder* decision" (Pet. App. A-15 to A-16). The court of appeals also ruled that the United States is authorized to bring Fourteenth Amendment claims in conjunction with other claims alleging racial discrimination in voting (*id.* at A-15 to A-16). Petitioners do not seek review of that ruling.

Petitioners do not identify any facts not in existence when *Little Thunder* was decided nor do they contend that the features of the state statutory scheme on which they rely for their view (Pet. 23-24) that governing bodies of organized counties have little discretionary power over unorganized counties are recently enacted provisions. Considering essentially the same statutory scheme it had previously examined in *Little Thunder*, the court of appeals observed (Pet. App. A-24) that "officials of Fall River County exercise general governmental functions with respect to Fall River County and Shannon County." The factors cited by petitioners as exceptions to that general rule do not reveal that conclusion to be incorrect.

As petitioners indicate (Pet. 13, 15), Shannon County residents have their own county school board and highway board, but the existence of a separately elected or appointed school board or roads commission is not generally thought to mean that citizens would have no significant interest in the decisions of general governmental bodies, such as boards of county commissioners, that manage local government. Similarly the authority exercised by the organized county officers over Shannon county residents is not diminished in any important way by the fact that those officers must keep separate records and tax fund deposits for Shannon County (Pet. 14) and are limited in the amount of property tax they can levy on Shannon County residents (Pet. 13-14) or that Shannon County may have its own deputy sheriff (Pet. 14-15), an officer who is appointed by the Fall River County sheriff (S.D. Comp. Laws Ann. § 7-17-6 (1967)). In sum, the broad general authority of the county officers over the affairs of Shannon County clearly makes *Little Thunder* distinguishable from the unique factual circumstances in *Holt Civic Club* that supported the holding in that case. See *Holt Civic Club* v. *Tuscaloosa*, *supra*, 439 U.S. at 72-73 n.8; *id.* at 78 (Stevens, J., concurring).

Given its holding in *Little Thunder* that Shannon County residents are constitutionally entitled to vote for the county officers who govern both Fall River County and Shannon County, the court of appeals correctly concluded that otherwise qualified Shannon County residents are similarly entitled to run for those county offices. *Holt Civic Club,* which concerned only the right to vote, provides no basis for attacking the court of appeals' holding (Pet. App. A-21) that, where residency restrictions are involved, no more need be shown to establish the right to run for office than to establish the right to vote. Indeed, petitioners do not appear to dispute this proposition.

4. Finally, it should be noted that the South Dakota legislature has repealed many of the most significant features of the statutory scheme that petitioners would have this Court consider in the course of determining the correctness of the decision below; and the legislature has, at the same time, enacted a new plan for the administration of the unorganized counties. 1979 S.D. Sess. Laws ch. 45. As the court of appeals noted (Pet. App. A-25 n.6), this law has not gone into effect because the Attorney General has interposed an objection pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. An action challenging the objection is now pending in the United States District Court for the District of Columbia, *South Dakota* v. *United States,* Civil Action No. 80-1976 (filed Aug. 6, 1980). That case is going forward in its discovery phase, but settlement discussions are continuing. Depending on its outcome, the issue in this case could become moot.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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